TECHREW SDN BHD v. NURHAMIZAH HAMZAH & ORS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIZAH NAWAWI JCA
AHMAD NASFY YASIN JCA
[CIVIL APPEAL NO: J-02(NCvC)(W)-712-06-2020]
12 APRIL 2022

Abstract – *A solicitor has a duty to undertake a brief and prosecute an action with reasonable care, skill and diligence, failing which it may subject him to an action in professional negligence. If therefore an action is struck out on account of the solicitor's failure in complying with valid directions or to act within time limits, or for want of prosecution, it is no defence to an action for damages for breach of duty to plead ignorance of the law, or to shift the blame on others unless such action or inaction was caused by or consented to by the client; the solicitor cannot hide behind contrived reasons or disingenuous arguments, as the court will never countenance those.*

LEGAL PROFESSION: *Negligence – Professional negligence – Action against solicitors – Failure to attend to client's appeal in Court of Appeal – Duty of care – Whether breached – Legal effect of solicitors signing warrant to act – Whether retainer in place and established – Whether trite elements of professional negligence satisfied – Whether client deprived of chances of success of defending claim in suit – Whether award of nominal damages just*

CIVIL PROCEDURE: *Appeal – Cross-appeal – Preliminary objection – Cross-appeal to vary order of Judicial Commissioner – Whether contravened rr. 5 and 8 of Rules of the Court of Appeal 1994 – Whether separate appeal ought to have been filed*

The appellant claimed against the first respondent, an advocate and solicitor practising as a sole proprietor, and the second and third respondents, also advocates and solicitors who were partners of a legal firm, for, *inter alia*, damages in the amount of RM5.85 million for professional negligence in the handling of the legal proceedings between Miracle Assets Builder Sdn Bhd ('MAB') and the appellant ('MAB Suit'). In the MAB suit, MAB was the main contractor in a construction project and had appointed the appellant as one of the sub-contractors. MAB had instituted an action against the appellant for liquidated ascertained damages in the amount of RM5.85 million for late completion of the works ('LAD'). The appellant appointed the first respondent to defend the MAB suit, and she accordingly entered an appearance and filed the defence. However, on 17 April 2018, MAB was successful in its application to strike out the appellant's defence on the

ground that it was a mere denial and did not disclose a reasonable defence. As a result, the judgment in the sum of RM5.85 million was entered against the appellant. The appellant then lodged an appeal and a notice was sent by the Court of Appeal to the first respondent, informing her that she had to file the record of appeal within 90 days of the decision which was being appealed against. Meanwhile, the appellant terminated the services of the first respondent and requested her to immediately forward all the documents to the second and third respondents' law firm, whom it claimed to have appointed as its new solicitors under a warrant to act. The second and third respondents' law firm sent to the first respondent letters regarding the taking over of the conduct of the matter, to which there was no response whatsoever. However, no notice of change of solicitors was filed in the Court of Appeal, and as such, the first respondent remained on record as the appellant's solicitor. Nevertheless, the second respondent appeared before the Deputy Registrar of the Court of Appeal for case management. Since the date for filing of the record of appeal had already lapsed, the Deputy Registrar of the Court of Appeal gave the appellant until 27 July 2018 to file a notice of motion for extension of time to file the record of appeal. This, however, was not done. Subsequently, a notice was issued by the Registry of the Court of Appeal. The respondent then replied to state that she was no longer the solicitor for the appellant, and that the new solicitors were the second and third respondent's law firm. As a result of the information, the Registry of the Court of Appeal sent a notice to the second and third respondents' law firm informing them that the date of disposal of the appeal would be 27 August 2018. Since neither the first respondent nor the second or third respondents had attended court on 27 July 2018, the Court of Appeal struck out the appeal for the reasons that the record of appeal had not been filed, and that no application had been made for an extension of time to file the same. Before the appellant's appeal was struck out, MAB had sent a notice dated 18 July 2018 to the appellant making a statutory demand under ss. 465/466 of the Companies Act 2016 for payment of the judgment sum. The appellant then had to negotiate with MAB on the settlement of the judgment sum and eventually a settlement agreement was entered between MAB and the appellant for the sum of RM2.85 million ('settlement agreement'). The appellant successfully applied for a stay of a winding-up order. Subsequently, the appellant instituted this action against all the respondents to recover a sum of RM5.85 million. After a full trial, the Judicial Commissioner ('JC') found the first respondent liable and nominal damages was awarded to the appellant. The claim against the second and third respondents was dismissed. Hence, the appellant appealed against the said decision of the JC in respect of the following (i) that it was dissatisfied with the nominal damages awarded against the first respondent; and (ii) in dismissing the appellant's claim against the second and third respondents.

The appellant sought to assail the decision of the JC on several grounds, *inter alia* (i) the JC failed to hold that the second and third respondents were liable for breach of their duty of care as solicitors for the appellant in failing to attend or sufficiently attend to the appellant's appeal in the Court of Appeal ('said appeal'); (ii) the JC failed to judicially appreciate the effect of the second and third respondents, collectively as partners of the firm, signing the solicitors' retainer (warrant to act) with the appellant, agreeing to take over conduct of the said appeal from the first respondent in exchange for an agreed solicitors' fee; (iii) failing to sufficiently consider the legal effect of the second and third respondents signing the warrant to act; and (iv) the JC had wrongly applied the Legal Profession (Practice and Etiquette) Rules 1978 ('LPPE') as rule of law, as opposed to rules of conduct, governing members of the legal profession in holding that second and third respondents' appointment was conditional upon obtaining consent from the first respondent in taking over conduct of the appeal and, therefore, could not have abdicated from their duties as solicitors for the appellant. In respect of damages, it was submitted that the JC failed to award the appellant damages of RM5.85 million due or at the very least RM2.85 million as per the settlement agreement payable by the appellant to MAB due to the respondents' breach of their solicitors' duties to the appellant. As regards to the cross-appeal, it was contended by the first respondent that the JC had erred in directing the first respondent to pay the second and third respondents' costs in the sum of RM30,000 as it was unexplainable from the standpoint of the first respondent being held liable in negligence to the appellant and not the second and third respondents. In essence, the first respondent was seeking by way of a cross-appeal to vary the learned JC's order that the first respondent bear the costs of the second respondent and the third respondent and reduce the quantum of nominal award pursuant to s. 69(1), (4) and (5) of the Courts of Judicature Act 1964 ('CJA'). At the outset of the hearing, the appellant also raised a preliminary objection that the variation sought in the cross-appeal went beyond what was permitted under rr. 5 and 8 of the Rules of the Court of Appeal 1994.

Held (allowing appeal)

Per Ahmad Nasfy Yasin JCA delivering the judgment of the court:

(1) The rules do not allow an appeal against the substantive finding of the court where the first respondent wants the decision to be reversed or set aside. The first respondent ought to have filed a separate appeal. The first respondent's cross-appeal contravened rr. 5 and 8 of the Rules of the Court of Appeal 1994 and s. 69(1), (4) and (5) of CJA could not be used to cure the defect in the notice of cross-appeal. The first respondent had failed to appeal against the quantum of the award but only award as to costs in favour of the second and third respondents. It is advisable

for a party to file a separate notice of appeal if the party wishes to challenge the propriety of the decision of the court appealed from as the scope of 'variation' that could be obtained through a notice of cross-appeal is rather limited. Many had fallen into the mistake of filing a cross-appeal without understanding the purpose and scope of the same. Such a practice has proven to be disastrous. (paras 39 & 40)

(2) There was a retainer in place between the appellant and the second and third respondents. The relationship of solicitor and client between the appellant and the second and third respondents could not be said to be inchoate as the conditions for the retainer had been completed where the task required to be undertaken and the fees had been agreed upon. This was not a case where the appellant was merely prospecting to appoint the second and third respondents as solicitor or that it was a case of implied retainer. It was different if the second and third respondents had not signed the warrant to act or were merely meeting the appellant with a view of taking up the case. Suppose the second and third respondents merely met with any of the appellant's directors and discussed about the cases but had neither signed by letter of appointment or agreed on fees, then in such a case, there could be a valid justification for the second or third respondents to say that neither express nor implied retainer could be said to have been established. (para 45)

(3) The only reason that the second and third respondents were clinging upon to avoid liability, namely the non-receipt of the no objection and the cause papers from the first respondent, was in fact, a contrived reason. The second and third respondents had admitted in their letter to the first respondent that they would be filing the notice of change of solicitors since the appellant had informed them that the first respondent had no objections to them taking over of conduct of the appeal. In any event, there was nothing on record to show that the first respondent had refused consent. Even if there was such a refusal, the second and third respondents should be aware of the steps that could be taken for them to take over conduct of the appeal from the first respondent. What the facts established was that the second and third respondents were acting half-heartedly in handling the brief and thus fell short of the professional standard of the solicitor in similar circumstances. The second and third respondents sought to press into service the Legal Profession (Practice and Etiquette) Rules 1978 in particular, r. 54 so as to shield them from liability in that their non-appearance was brought about by the fact that the first respondent was remaining on record. Such self-serving and a rather disingenuous argument could not be countenanced. The Rules must not be brought to serve the second and third respondents in that manner; rather it was to regulate the professional conduct between the lawyers and parties to a litigation. The rule had not prevented the second

respondent from appearing at the Court of Appeal for the case management earlier. This therefore lent credence to the submission that the argument of the second and third respondents as being lacking in *bona fides*. The appellant had satisfied the trite elements of professional negligence, that the second and third respondents owed a duty of care against the appellant and the duty had been breached. (paras 48 & 49)

(4) The appellant had on the balance of probabilities, proved that the second and third respondents had breached the standard of care while they were well aware that they had a duty to exercise reasonable degree of care and skill and diligence expected of a competent and reasonable experienced solicitor. It is trite and axiomatic that a solicitor has a duty to prosecute the action, including an appeal or to undertake the necessary getting up on a brief with reasonable care, skill and diligence. If therefore, the action is struck out for failing to comply with the directions or failure to act within time limits or for want of prosecution, it is no defence to an action for damages for breach of duty to plead ignorance of law and rules or shifting the blame to third parties, unless the client has caused or consented to action or inaction of the solicitor. In the present case, the JC was plainly wrong when she dismissed the appellant's claim against the second and third respondents. (paras 57 & 58)

(5) The claim for the sum equivalent to the judgment was not sustainable. The settlement agreement had been executed where MAB agreed to accept the sum of RM2.85 million as full and final settlement of the sum owing in the MAB suit and that pursuant to the settlement agreement, the appellant withdrew its notice of motion to the Court of Appeal to reinstate the appeal. There was evidence to show that the appellant and MAB had come to a settlement by way of the settlement agreement where a sum of RM2.85 million was to be paid by the appellant to MAB. The appellant had lost something of value and there was prospect of success in his appeal. There was nothing on record to show that the first or second and third respondents had discharged the evidential burden of showing that either of them had advised the appellant on the negative prospect of the appeal; on the contrary, the second respondent had advised differently. This court accordingly found that and assessed the prospect generously and arising from the first as well as the second and third respondents' professional negligence, the appellant had been deprived of the chances of success of defending the claim in the MAB suit. The award of nominal damages would not be just in the circumstances. Curial intervention was required. Thus, this court entered judgment for the appellant and awarded damages of RM2.85 million to be apportioned equally in the sum of RM1,425,000 each between the first respondent on one part and the second and third respondents on the other part. (paras 59, 61, 63-65)

Case(s) referred to:

Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***
Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***
Lee Kuang Guat v. Chiang Woei Chien [2021] 3 CLJ 237 CA ***(refd)***
Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344 CA ***(refd)***
Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp (a firm) [1978] 3 All ER 57 ***(refd)***
Mount v. Barker Austin 14 LDAB 98 ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 184 ***(refd)***
Sharif And Ors v. Garrett & Co (a firm) [2001] 3 All ER 195 ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co [2010] 1 CLJ 913 HC ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***
Wong Chop Saow v. PP [1964] 1 LNS 218 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 465, 466
Courts of Judicature Act 1964, s. 69(1), (4), (5)
Evidence Act 1950, ss. 45, 136(1)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 42, 54
Rules of Court 2012, O. 40A rr. 2(1), (2), O. 64
Rules of the Court of Appeal 1994, rr. 5, 8

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[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: JA-23NCVC-2-01-2019 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Nasfy Yasin JCA:

Introduction

[1] This is an appeal by the appellant against the decision of the learned Judicial Commissioner ("learned JC"), in respect of the followings:

(i) dissatisfied with the nominal damages awarded against the first respondent; and

(ii) dismissing the appellant's claim against the second and third respondents. Whilst the first respondent by way of cross-appeal seeking leave to vary the learned JC's decision that she had to bear costs of the second and third respondents.

[2] We heard the appeal and after giving our most anxious and meticulous consideration on the submissions from the appellant's counsel as well as the counsel for the respondents and after careful perusal of the record of appeal, we are satisfied that there are merits in the appeal warranting appellate intervention. Hence, we unanimously allowed the appeal. The following are our grounds in arriving at the decision.

Background Facts

[3] The appellant is a company incorporated in Malaysia. The first respondent is an advocate and solicitor of the High Court of Malaya, practising as a sole proprietor. The second and third respondents, are also advocates and solicitors, who were partners of a legal firm, named in the title of the action.

[4] The appellant's claim in the court below, against the respondents, is, for, *inter alia*, damages in the amount of RM5.85 million for professional negligence in the handling of the legal proceedings between Miracle Assets Builder Sdn Bhd ("MAB") and the appellant ("MAB suit").

[5] In the MAB Suit, MAB was the main contractor in a construction project. It had appointed the appellant as one of the sub-contractors. MAB had instituted an action against the appellant in December 2017 for liquidated ascertained damages in the amount of RM5.85 million for late completion of the works ("LAD"). At the material time, the solicitors for MAB were the firm of Messrs Clarence Edwin Law Offices, of which Datuk Clarence Edwin ("PW2") and Mr Paramanandan ("Mr Param") are the partners.

[6] The appellant appointed the first respondent to defend the MAB suit, and she accordingly entered an appearance and filed the defence. However, on 17 April 2018, MAB was successful in its application to strike out the appellant's defence on the ground that it is a mere denial and did not disclose a reasonable defence. As a result, the judgment in the sum of RM5.85 million was entered against the appellant.

[7] The appellant then lodged an appeal on 30 April 2018. A notice dated 8 May 2018 was sent by the Court of Appeal to the first respondent, informing her that she had to file the record of appeal within 90 days of the decision which was being appealed against. The appeal was fixed for case management on 18 July 2018.

[8] Meanwhile, the appellant terminated the services of the first respondent *via* a letter dated 2 June 2018 [exhibited at p. 57 of the common bundle of documents ("CBD")] and requested her to immediately forward all the documents to the second and third respondents' law firm, whom it claimed to have appointed as its new solicitors.

[9] On 6 June 2018, after the appellant had appointed the second and third respondents' law firm as its solicitors under a warrant to act (exhibited at p. 50 of the CBD), the law firm sent to the first respondent, letters dated 6 June 2018 (exhibited at p. 64 of the CBD) and 12 June 2018 (exhibited at p. 13 of the respondents' additional bundle of document), regarding the taking over of the conduct of the matter, to which there was no response whatsoever. However, no notice of change of solicitors was filed in the Court of Appeal, and as such, the first respondent remained on record as the appellant's solicitor.

[10] Nevertheless, on 18 July 2018, the second respondent appeared before the Deputy Registrar of the Court of Appeal for case management. Since the date for filing of the record of appeal had already lapsed, the Deputy Registrar of the Court of Appeal gave the appellant until 27 July 2018 to file a notice of motion for extension of time to file the record of appeal. This, however, was not done.

[11] Subsequently, a notice dated 10 August 2018 was issued by the Registry of the Court of Appeal. The first respondent then replied to state that she was no longer the solicitor for the appellant, and that the new solicitors were the second and third respondents' law firm. As a result of this information, although there was neither a notice of change of solicitors nor an order for discharge of solicitors, the Registry of the Court of Appeal sent a notice dated 17 August 2018 to the second and third respondents' law firm informing them that the date of disposal of the appeal would be on 27 August 2018.

[12] Since neither the first respondent nor the second or third respondent had attended court on 27 August 2018, the Court of Appeal struck out the appeal for the reasons that the record of appeal had not been filed, and that no application had been made for an extension of time to file the same. It is to be noted that before the appellant's appeal was struck out, MAB had sent a notice dated 18 July 2018 to the appellant making a statutory demand under ss. 465/466 of the Companies Act 2016 for payment of the judgment sum.

[13] The appellant then had to negotiate with MAB on the settlement of the judgment sum and eventually a settlement agreement dated 21 November 2018 was entered between MAB and the appellant for the sum of RM2.85 million ("the settlement agreement"). The appellant, on 6 December 2018, successfully applied for a stay of a winding-up order.

[14] On 30 January 2019, the appellant instituted this action against all the three defendants to recover a sum of RM5.85 million.

[15] After a full trial, the learned JC found the first respondent was liable and nominal damages was awarded to the appellant. The claim against the second and third respondents was dismissed.

The High Court's Decision

[16] In short, the appellant's case against the first respondent was for negligence in the performance of her professional duties to the appellant in the MAB suit, in particular, for the following:

(i) failing to inform and advise the appellant about the striking out application by the High Court, and the implications thereof;

(ii) failing to inform and advise the appellant of the proceedings pertaining to the appeal to the Court of Appeal, and to attend to matters with regard thereto; and

(iii) failing to follow-up with the second and third respondents' law firm pertaining to transferring the matter to them, and to notify them regarding the appeal to the Court of Appeal.

[17] Whilst the case against the second and third respondents were also for professional negligence, in particular, for the following:

(i) failing to prepare and file the notice of change of solicitors; and

(ii) failing to attend to matters pertaining to the appeal to the Court of Appeal, which caused the appellant's appeal to the Court of Appeal to be struck out.

[18] At the trial, the appellant called three witnesses. They are:

(i) Mohd Azhar bin Baba (PW1) – an employee of Maxis Broadband Sdn Bhd;

(ii) Datuk Clarence Edwin (PW2) – Advocate and Solicitor of the High Court of Malaya; and

(iii) Ten Sing Jeng (PW3) – managing director of the appellant.

[19] In gist, the appellant's evidence of its averment on the liability of the respondents and the losses suffered as a result thereof, emanated mainly through PW2. The respondents, unhappy with that evidence, applied to expunge the evidence of PW2 on the basis that the evidence that he gave was in the nature of an opinion, for which he was not qualified to give. The learned JC had agreed with the respondents and ruled to expunge PW2's evidence which was characterised as opinion evidence and a scrutiny of the grounds of judgment showed that the following was given as the reasons:

(i) That the appellant was unable to assist the court when asked which statutory provision allowed for the opinion of PW2 to be admissible, bearing in mind that the areas of expertise provided for in s. 45 of the Evidence Act 1950, did not provide for PW2's evidence to be proffered.

(ii) The appellant failed to establish the expertise of PW2 as prescribed by plethora of authorities, including *Wong Chop Saow v. PP* [1964] 1 LNS 218; [1965] I MLJ 247, and *Chan Kwee Fong v. PP* [2010] 3 CLJ 671; [2010] 1 MLJ 441.

[20] At the conclusion of the trial and during the submission, the appellant urged the court to reverse the earlier ruling in respect of the opinion evidence of PW2, since it was the appellant's contention that the opinion evidence of an advocate and solicitor is allowed in cases of professional negligence, based on the cases of *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486, and *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368; [2017] 4 MLJ 207.

[21] The learned JC was clearly unimpressed with the appellant's submission and instead went to hold that PW2 had transcended his role in court and that pursuant to O. 40A r. 2(1) of the Rules of Court 2012 ("ROC 2012"), the expert's function is to assist the court on the matters within his expertise, but in the case before the learned JC, she found that PW2 was overzealous in his answers and had given conclusions on matters which are eminently matters for the court to decide; would tend to arrogate to himself the functions of the court. The learned JC also found that as a witness of both opinion and fact, PW2's role in the MAB suit rendered his presence in this case, as a witness for the appellant, highly irregular. He was the counsel who acted for and advised MAB on the approach and strategy to be adopted against the appellant in the MAB suit and was successful in the application being entered against it for RM5.85 million. The learned JC took, to us, a rather adverse view by again charactering the evidence of PW2 as some sort of a remarkable twist to the tale, since PW2, without being subpoenaed had voluntarily agreed to give evidence on behalf of the appellant and even attempted to demonstrate how to set aside the very judgment that he himself had obtained. Thus, the learned JC held that the involvement of PW2 in this claim is highly improper and was contrary to r. 42 of the Legal Profession (Practice and Etiquette) Rules 1978. At this juncture, the learned JC had concluded that the presence of the PW2 in court as a witness for the appellant compromised his partiality. In view of these findings, the learned JC held that the evidence of PW2 cannot be accepted.

[22] As regards the evidence of PW3, first and foremost, the learned JC found that he was inconsistent in his evidence on the winding-up proceedings instituted by MAB against the appellant. His initial position was that he was ignorant of the same, but when prodded during cross-examination, he admitted having knowledge of it but claimed that he had discovered it from other sources. In respect of his association with PW2, he was initially evasive and denied having met him, but after further questioning, he admitted having met PW2, not once but twice, to arrange for the settlement of the MAB suit. The learned JC then concluded that the evidence of PW3 was, in total, unreliable.

[23] The learned JC also found that the appellant had failed to disclose the settlement agreement executed between the appellant and MAB which contained the following terms:

(i) that MAB agree to accept the sum of RM2.85 million as a full statement of the sum owing in the MAB suit;

(ii) that the appellant shall pay the agreed settlement amount in instalments;

(iii) that the appellant may apply to the High Court for a stay of the winding-up order and the settlement agreement be recorded as part of the order granting a stay; and

(iv) that the appellant shall withdraw all pending proceedings filed on its behalf in relation to the judgment.

[24] It is to be noted that pursuant to the settlement agreement, the appellant had withdrawn its notice of motion in the Court of Appeal to reinstate the appeal and was also successful in obtaining a stay of the winding-up order, which was granted by the High Court on 6 December 2018.

[25] It is not in dispute that the settlement agreement was discovered and adduced by the second and third respondents during the trial. The appellant had objected to the disclosure of the same on the ground that the original sum of RM5.85 million was not paid rendering the settlement agreement irrelevant. The learned JC held that the appellant's argument was untenable as there was no valid reason in law to object to the disclosure of the same. In addition, it is not for the appellant to decide on the relevancy or otherwise of the settlement agreement as provided for in sub-s. 1 of s. 136 of the Evidence Act 1950. As such the learned JC ruled that the settlement agreement was relevant as first and foremost, it formed part of the narrative in light of the revelation that the appellant had initially filed an application in Court of Appeal to reinstate the appeal but withdrawn it later as part of the settlement agreement.

[26] The respondents' arguments, in summary, was that each of them owed no duty of care and thus cannot be held liable for any professional misconduct in carrying out their respective role as solicitors for the appellant and thus was not responsible for any loss suffered by the appellant.

[27] For the first respondent, it was argued that too much emphasis had been placed on the first respondent remaining as solicitor on record, but that, it was further submitted, had no effect on the matter, since the appellant had terminated her services with effect from 2 June 2018, and therefore, the first respondent owed no duty of care to the appellant thereafter.

[28] In this regard, the learned JC was of the view that as solicitor on record, it is important to look at O. 64 of the ROC 2012 which deals with the change of solicitors. The provision reads:

A Order 64 - Change of Solicitor

Rule 1 - Change of Solicitor by Notice.

(1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but *unless and until a notice of the change is filled and served in accordance with this rule, that former solicitor shall, subject to rule 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter.*

B

(2) A notice of a change of solicitor in Form 136 shall be filed in the Registry.

C (3) The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice.

(4) The party giving the notice may perform the duties prescribed by this rule in person or by his new solicitor.

D (emphasis added)

[29] In short, the learned JC held that the first respondent was liable for her total failure of communication in the following aspects:

(i) failure to comply with the instructions of the appellant *via* letter dated 2 June 2018, where she was specially requested by the appellant to E immediately allow the second and third respondents' law firm to have the relevant documents;

(ii) failure to respond to the letters dated 6 June 2018 and 12 June 2018 from the second and third respondents' law firm, although she added F that whilst she herself had not sighted the second letter, she conceded that members of her law firm might have had; and

(iii) Failure to return telephones calls from the second and third respondents' law firm relating to the appeal at the Court of Appeal which eventually resulted in the appeal being struck off.

G **[30]** In addition, the learned JC also found that the first respondent had failed to attend the case management at the Court of Appeal on 18 July 2018, and thus did not have personal knowledge of what transpired on that day, which necessarily meant that whatever she said in evidence as being hearsay. Despite having received a notice dated 10 August 2018 from the Court of H Appeal, and in the absence of a notice of change of solicitor or discharge order, the first respondent had failed to take the necessary steps to prosecute the appeal. The only thing which she did was to place a call to the Registry of the Court of Appeal informing that she was no longer the solicitor, a representation which led to the Court of Appeal issuing a notice to the second I and third respondents' law firm, which we must state, is rather irregular, as at all times, the first respondent remained on record as the solicitor for the appellant.

[31] The learned JC also held that if the first respondent could make the effort to communicate with the Court of Appeal and even provide it with details of the second and third respondents' law firm, it would not have been an onerous a task for her to respond to the second and third respondents' letter (*via* emails) and telephone calls. In this regard, the learned JC found that there was absolutely no excuse or reason whatsoever for her failure to communicate with the second and third respondents' law firm. As such in this case, the root of the liability of the first respondent lay in the fact that there was no communication at all.

[32] The first respondent undisputedly accepted that the second and third respondents' law firm must obtain the relevant cause papers as well as the consent of the first respondent since she was the solicitor on record. This is in accordance with r. 54 of the Legal Profession (Practice and Etiquette) Rules 1978. The first respondent also candidly admitted that she did not do as requested by the second respondent, resulting in the second and third respondents' law firm's inability to proceed further to file the notice of change of solicitors.

[33] The learned JC was of the further view that the taking over of the matter by the second and third respondents' law firm was conditional upon receiving the relevant cause papers, and obtaining the consent of the first respondent, both of which had not been fulfilled. The second and third respondents' law firm could not have been faulted for attending the case management despite not being the solicitor on record. Looking at the evidence as a whole, the learned JC did not find that the second respondent to be dishonest or evasive as claimed by the appellant. Thus, it was concluded by the learned JC that there was no reason to disbelieve him. As such the appellant's claim against both the second and third respondents was dismissed.

Whether The Appellant Had Suffered Loss?

[34] Upon analysis, the learned JC held that damages was proved, on a balance of probabilities in that the appellant has suffered loss as a result of the first respondent's negligence. After considering all the relevant evidence, both oral and documentary, the learned JC found that the appellant had failed to prove that he had a real and substantial prospect of success in the appeal and thus the case rested on a mere negligence. In addition, the alleged loss as claimed was merely based on speculation and conjecture.

[35] In short, since the first defendant was found to be liable but the plaintiff had failed to prove the loss suffered, the learned JC held that an award of nominal damages was apt. Therefore, the first defendant was ordered to pay RM50,000 and costs in the amount of RM20,000 subject to allocator fees.

A **Grounds Of Appeal**

[36] Before us, the appellant had sought to assail the decision of the learned JC on several grounds. We trust that no injustice will be visited upon the appellant or learned counsel by us summarising the grounds, as follows:

B (i) the learned JC failed to hold the second and third respondents are to be liable for a breach of their duty of care as solicitors for the appellant in failing to attend or sufficiently attend to the appellant's appeal in the Court of Appeal *vide* Civil Appeal No: J-02(IM)(NCvC)-797-05-2018 ("the said appeal");

C (ii) the learned JC failed to judicially appreciate the effect of second and third respondents, collectively as partners of the firm and as husband and wife, signing the solicitors' retainer (warrant to act) dated 6 June 2018 with the appellant agreeing to take over conduct of the said appeal from the first respondent in exchange for an agreed solicitors' fee of RM150,000, of which RM30,000 was for the filing of the stay of the winding-up proceedings (which was eventually undertaken by Messrs Thomas Lai & Wallace) and RM120,000 for the taking over the conduct of the appeal proper. To that end, the appellant had paid the firm a sum of RM78,000. Therefore, the decision to dismiss the appellant's claim for negligence against the second and third respondents is plainly wrong;

(iii) the learned JC misapprehended and misdirected herself in holding that the evidence of Datuk Clarence Edwin (PW2) was compromised because his opinion was based on the settlement agreement dated 21 November 2018 ("SA"), which his firm had prepared and, therefore, his testimony amounted to being in complicity with PW3 and, therefore not independent;

(iv) failing to sufficiently consider the legal effect of the second and third respondents signing the warrant to act on 6 June 2018 with the appellant,

(v) failing to consider at all the WhatsApp messages where the appellant was appealing to the second respondent to do all that was necessary to attend to the said appeal;

H (vi) failing to consider at all the credibility of second respondent's testimony against the contemporaneous documents such as the firm's retainer and second respondent's letter of 6 June 2018 and 12 June 2018 to the first respondent and second respondent's and the subsequent conduct in appearing before the Deputy Registrar of the Court of Appeal as stated above. The two conditions for taking over testified to by the second respondent lacked proof and runs against the term of the warrant to act;

(vii) failing to consider at all that first respondent and second respondent's retainer obligated them to professionally attend to and advice the appellant and attend to matters relating to the terms of their retainer of which the filing of the notice of change of solicitors was a mere procedural step common in the legal fraternity; and

(viii) the learned JC had wrongly applied the Legal Profession (Practice and Etiquette) Rules 1978 ("LPPE") as rule of law, as opposed to rules of conduct, governing members of the legal profession in holding that second and third respondents' appointment was conditional upon obtaining consent from D1 in taking over conduct of the appeal and, therefore, could not have abdicated from their duties as solicitors for the appellant.

[37] In respect of damages, it was submitted that the learned JC had failed to award the appellant, damages of RM5.85 million due or at the very least RM2.85 million as per the settlement agreement payable by the appellant to MAB due to the respondents' breach of their solicitors' duties to the appellant.

[38] As regards to the cross-appeal, it was contended by the first respondent that the learned JC had erred in directing the first respondent to pay the second and third respondents' costs in the sum of RM30,000 as it is unexplainable from the standpoint of first respondent being held liable in negligence to the appellant and not second and third respondents. In essence, the first respondent is seeking by way of a cross-appeal to vary the learned JC's order that the first respondent bears the costs of second respondent and the third respondent and reduce the quantum of nominal award pursuant to s. 69(1), (4) and (5) of the Courts of Judicature Act 1964 ("CJA 1964").

Preliminary Objection

[39] Learned counsel for the appellant, at the outset of the hearing, had raised a preliminary objection that the variation sought in the cross-appeal goes beyond what is permitted under rr. 5 and 8 of the Rules of the Court of Appeal 1994. In short, the rules do not allow an appeal against the substantive finding of the court where the first respondent wants the decision to be reversed or set aside. In short, the first respondent ought to have filed a separate appeal.

[40] We have heard the submissions and at this juncture sustain the objection that the first respondent's cross-appeal contravened rr. 5 and 8 of the Rules of the Court of Appeal 1994 and s. 69(1), (4) and (5) of CJA 1964 cannot be used to cure the defect in the notice of cross-appeal. Simply put, first respondent has failed to appeal against the quantum of the award but only award as to costs in favour of second and third respondents. In this regard useful reference may be made to the decision of the Federal Court in

the case of *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149 FC wherein the court had examined the distinction between a cross-appeal and the need to file a notice of appeal in given circumstances. We should add that as a matter of prudence it is advisable for a party to file a separate notice of appeal if the party wishes to challenge the propriety of the decision of the court appealed from as the scope of "variation" that could be obtained through a notice of cross-appeal is rather limited. Many had fallen into the mistake of filing a cross-appeal without understanding the purpose and scope of the same, a step taken perhaps as a hedging the bests hoping that the cross-appeal may bring results. Such a practice, akin to taking a gamble many a time, had proven to be disastrous, as gambling does.

Our Decision Of The Appeal

[41] As alluded to earlier, the first respondent, in point of fact, did not appeal against the finding of liability and thus there is a clear acceptance of the finding of liability. Instead, she is seeking leave to vary the part of the decision as regards to cost to be paid to second and third respondents. We must say at once that, on principles, the issue of costs is a matter of discretion, for which the trial court will be entitled to determine and that based on the fact pattern on this case the trial court is entitled to make orders for costs including the making of *Bullock* or *Sanderson* order. The appellate court will be, as against the making of discretionary order, very slow in interfering with the exercise of discretion unless clearly demonstrated that the same is made irregularly or without basis. In the present case, given the position that we have taken with regard to the liability of the second and third respondents against the plaintiff, it is unnecessary for us to make any finding on this exercise of discretion to award costs against the first respondent save to say that the decision on that award of costs must accordingly be set aside.

[42] The relationship between a solicitor and his client is dictated by a contract but liability is not in contract alone. There is liability in tort too-and that the liability could be concurrent – see the analysis in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 57 and accepted by this court in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 CA. It is to be recalled that the appellant's claim against the respondents is premised on professional negligence. The requirement to sustain a claim in professional negligence against a solicitor is not the same as the requirement to prove a case in negligence simpliciter that does not involve a professional. This court in the case of *Shearn Delamore & Co v. Sadacharamani Govindasamy* (*supra*) held that:

> [12] In negligence case, there are, *inter alia*, three elements which need to be pleaded and established. However, in professional negligence case there is a fourth element which must be pleaded and proved and that is related to standard of care.

[43] Thus, in a professional negligence case such as the present case, the appellant was required to prove the following elements to succeed in its claims against the respondents:

(i) duty of care;

(ii) standard of care;

(iii) whether that standard of care was breached; and

(iv) damages.

[44] To recapitulate, the following facts are relevant:

(i) that the first respondent had failed to keep the appellant informed of its case, especially when the said case was struck out by the Court of Appeal causing a judgment to be entered against the appellant for RM5.85 million by MAB;

(ii) that the first respondent had not kept the appellant informed of the proceedings in the Court of Appeal, especially, the issue of transferring the said appeal to the second and third respondents' firm;

(iii) that the first respondent had signed a retainer for RM25,000;

(iv) that second and third respondents had not filed the notice of change of solicitors;

(v) that the second and third respondents had not attended to the appeal at the Court of Appeal which resulted in the appeal being struck-off;

(vi) that the second and third respondents had signed a warrant to act to take over conduct from first respondent and to get up the case at the Court of Appeal, including filing a stay of proceedings for an agreed fee totalling RM150,000; and

(vii) that the appellant had to enter into a settlement agreement for which it was required to pay the sum of RM2.85 million to MAB.

[45] Learned counsel for the second and third respondents sought to support the decision of the learned JC in holding that the second and third respondents should not be liable for the appellant in professional negligence and sought to justify their actions in not prosecuting the appeal on two reasons: first that the non-receipt of no-objection from the first respondent and secondly the non-receipt of the cause papers also from the first respondent. We must be forgiven for classifying this argument as a form of blame shifting, whereby the blame lies elsewhere. The second and third respondents however were at pains to shun the facts that the second and third respondents were properly appointed by the appellant to take over conduct of the said appeal from first respondent after signing a warrant to act dated 6 June 2018 for an agreed fee of RM30,000 for a stay of execution proceedings and RM120,000 to handle the appeal toward the end where, in

total, a sum of RM78,000 was paid to the firm on 8 August 2018. In short, there is a retainer in place between the appellant and the second and third respondents. Here we must state at once that the relationship of solicitor and client between the appellant and the second and third respondents cannot be said to be inchoate as the conditions for the retainer have been completed where the task required to be undertaken and the fees have been agreed upon. This is not a case where the appellant was merely prospecting to appoint the second and third respondents as solicitor or that it is a case of implied retainer. It is different if the second and/or third respondent had not signed the warrant to act or were merely meeting the appellant with a view of taking up the case. Suppose the second and third respondents merely met with any of the appellant's directors and discussed about the cases but had neither signed by letter of appointment or agreed on fees, then in such a case, there could be a valid justification for the second or third respondent to say that neither express nor implied retainer could be said to have been established.

[46] It is undisputed that the second and third respondents neither applied for a stay of the winding-up proceeding nor attended to the brief by pursuing the taking over of the conduct of the said appeal by filing a notice of change of solicitors, resulting in the appeal being struck-off on 27 August 2018 with costs of RM4,000 being ordered by the court. The appellant only came to know of what transpired at the Court of Appeal when it received a statutory notice under the Companies Act 2016 from MAB to wind up the appellant if the judgment sum of RM5.85 million is not paid. The evidence showed that PW3 contacted second respondent on his mobile phone demanding an explanation, but the second respondent informed that PW3 should not be anxious as he would take care of the matter.

[47] Upon discovering that the appeal was struck out, PW3 sought the service of Messrs C Sankaran & Co to file a negligence suit against the respondents as pleaded in the SOC.

[48] Having considered the facts in totality, we are of the view that the only reason that the second and third respondents are clinging upon is to avoid liability, namely the non-receipt of the no objection and the cause papers from the first respondent, is in fact, a contrived reason. It is clear that the second and third respondents had admitted in their letter of 6 June 2018 to the first respondent that they would be filing the notice of change of solicitors since the appellant had informed them that the first respondent had no objections to them taking over of conduct of the appeal. In any event, there is nothing on record to show that the first respondent had refused consent. Even if there is such a refusal the second and third respondent should be aware of the steps that could be taken for them to take over conduct of the appeal from the first respondent. What the facts established was that the second and third respondents were acting half-heartedly in handing the brief and thus fell short of the professional standard of the solicitor in similar

circumstances. We noted that the second and third respondents sought to press into service the Legal Profession (Practice and Etiquette) Rules 1978 in particular, r. 54 so as to shield them from liability in that their non-appearance was brought about by the fact that the first respondent remaining on record. We must say that such self-serving and a rather disingenuous argument cannot be countenanced. The Rules must not be brought to serve the second and third respondents in that manner; rather it is to regulate the professional conduct between lawyers and parties to a litigation. In any event, the rule had not prevented the second respondent from appearing at the Court of Appeal for the case management earlier. This therefore, lend great credence to the submission that the argument of the second and third respondents as being lacking in *bona fides*.

[49] Premised on the facts and evidence we are of the view that the appellant has satisfied the trite elements of professional negligence, that the second and third respondents owed a duty of care against the appellant and the duty have been breached. Accordingly, the decision of the learned JC is plainly wrong on this point and must be set aside.

Whether Expert Evidence Is Necessary To Assist The Court?

[50] We have in the earlier part of this judgment referred to the relevant part of the decision of the learned JC wherein she had rejected the evidence of PW2 on the basis that some of the evidence offered by the witness appears to be that which should be given by an expert. We must state that the learned JC appeared to be obsessed or consumed with characterising the evidence of the witness as if the assessment of an evidence is a pigeonhole exercise by classifying according to defined categories. We find that such a practice is unwarranted. Much of the learned JC's time was dominated by the issue of whether expert evidence is necessary to determine the liability of the defendants before her. Given the state of confusion we find it necessary to reiterate the following observations of Raja Azlan Shah CJ (as he then was) in *Wong Swee Chin v. PP* [1980] 1 LNS 138, on the role of the expert:

> Our system of jurisprudence does not, generally speak, remit the determination of dispute to experts. Some question are left to the robust good sense of a jury. Others are solved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinion are in appropriate cases placed before juries or judges. **But except on purely scientific issues expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments**. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weight all the evidence and determine the probabilities, it cannot transfer this task to the expert witness the court must come to its own opinion.
>
> (emphasis added)

[51] To our mind in the instant case, the facts are simple and straightforward in which expert evidence is unnecessary. Reverting to the evidence presented by PW2, the learned JC ruled that PW2's role in the MAB suit rendered his presence in this case, as a witness for the appellant (who was the opponent or adversary of his client), highly irregular. PW2 was the counsel who had acted for and advised MAB on approach and strategy to be adopted against the appellant in the MAB suit and was successful in the application to strike out the appellant's defence, which resulted in judgment being entered against it for RM5.85 million. PW2 was held to be overzealous in his answers and had no qualms in concluding with absolute conviction that the respondents were indeed negligent. The PW2 also was held not to be an independent witness prescribed by O. 40A r. 2(2) of the ROC 2012. Which reads:

> Order 40A - Experts of parties
>
> Rule 2 - Expert's duty to court
>
> ...
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

[52] To satisfy ourselves, we have perused the evidence of PW2 with a fine toothcomb. He testified the following:

(i) he represented MAB in the said MAB suit filed against the plaintiff;

(ii) MAB succeeded in striking-out the defence and entering judgment for the sum of RM5.85 million on 17 April 2018;

(iii) an appeal was filed against the judgment and a letter dated 18 May 2018 was issued by the Court of Appeal informing that the record of appeal ("ROA") must be filed by 17 July 2018 and fixing 18 July 2018 as a case management date;

(iv) no draft index of the ROA was served on him as required under Rules of the Court of Appeal;

(v) on 18 July 2018, he attended to the case management. The first respondent did not appear. Instead, the second respondent appeared and informed the Deputy Registrar that he was instructed to take over conduct of the matter from first respondent and he would be filing an application for extension of time to file the record of appeal. The Deputy Registrar then fixed 10 August 2018 to enable second respondent to file the said application;

(vi) On 10 August 2018, neither first nor the second respondent appeared, forcing the Deputy Registrar to fix the appeal for disposal on 27 August 2018. No notice of change of solicitors was filed;

(vii) PW2 received two letters dated 10 August 2018 and 17 August 2018 from the Court of Appeal informing first and the second respondents of the hearing before the panel falling on 27 August 2018. Since neither first nor second respondent appeared the court struck out the appeal; and

(viii) sometime towards the end of 2018, PW3 visited him seeking advice as to how to resolve the matter. PW2 advised PW3 to seek independent legal advice as to whether first respondent and/or second and third respondents were professionally negligent, in particular, where despite second respondent attending on 18 July 2018, the second and third respondents being the partners of the legal firm had failed to comply with the COA's directions.

[53] In our judgment, there is nothing that could be concluded that PW2 is not an independent witness. On the contrary, he has the full knowledge of what was transpired during the proceedings at the Court of Appeal. He was a witness of fact. Hence, there was no reason to disbelieve him. For all intent and purposes, he cannot be said to be giving evidence as an expert and in so far as he purports to give his view that evidence could of course be disregarded.

[54] As regards PW3, the learned JC had ruled that his evidence is fragmentary and, as a result, thereof unsafe to rely upon. Among others, he was inconsistent in his evidence on the winding-up proceedings instituted by MAB against the appellant. He was ignorant of the same, but when podded during cross-examination, he admitted knowledge of it but claimed that he had discovered it from other sources. Regarding his association with PW2, he was initially evasive and denied having met him, but after further questioning, he admitted having met PW2 to arrange for the settlement of the MAB suit.

[55] We have also carefully considered PW3's evidence which may be summarised as follows:

(i) he had appointed first respondent to defend the said MAB suit after paying 50% of on agreed retainer fee of RM25,000 based on a retainer dated 21 February 2018. The said retainer could be terminated upon notifications in writing;

(ii) after entering an appearance, the first respondent filed the defence without consulting the appellant, resulting in the said defence being nothing more than a bare denial. Judgment for the sum of RM5.85 million together with costs of RM1,000 was accordingly entered on 17 April 2018;

(iii) first respondent did not inform the plaintiff of the above. He heard of the same from his consultant, MAC;

(iv) second and third respondents were appointed to take over conduct of the said appeal from the first respondent after signing a warrant to act dated 6 June 2018 for an agreed fee. Toward that end, a sum of RM78,000 was paid to the firm on 8 August 2018;

(v) second and third respondents failed to discharge their professional duties in not applying for a stay or attending to take over of the said appeal resulting in the appeal being struck-off on 27 August 2018 with costs of RM4,000 being ordered by the court; and

(vi) PW3 then contacted second respondent for explanation. No satisfactory explanation was given.

[56] In light of the above, we are of the view that the learned JC was too preoccupied in the pigeonhole exercise and therefore erred in her finding that PW3 is not a truth full witness when he gives evidence on something not direct to the pivotal issues of the case. To our mind, the discrepancy in testimony, does not straight away make the witness unreliable or make the whole of his evidence is unacceptable. On this point, Raja Azlan Shah FJ in the of *PP v. Datuk Hj Harun Hj Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15, had this to say:

> ... in my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember accurately every single thing that happened ... The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirely or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

[57] It is our considered judgment that on the totality of evidence as a whole, the appellant had on the balance of probabilities, proved that the second and third respondent has breached the standard of care while they are well aware that they have a duty to exercise reasonable degree of care and skill and diligence expected of a competent and reasonable experience solicitor – *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 CLJ 913; [2010] 1 MLJ 284; *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* (*supra*); and *Lee Kuang Guat v. Chiang Woei Chien* [2021] 3 CLJ 237.

[58] It is trite and axiomatic that a solicitor has a duty to prosecute the action, including an appeal or to undertake the necessary getting up on a brief with reasonable care, skill and diligence. If therefore, the action is struck out for failing to comply with the directions or failure to act within time limits

or for want of prosecution, it is no defence to an action for damages for breach of duty to plead ignorance of law and rules or shifting the blame to third parties, unless the client has caused or consented to action or inaction of the solicitor. In the present case, the learned JC was plainly wrong when she dismissed the appellant's claim against the second and third respondents.

The Assessment Of Damages

[59] In respect of damages, it is plain that the claim for the sum equivalent to the judgment is not sustainable. It is in evidence that the settlement agreement had been executed where MAB agreed to accept the sum of RM2.85 million as full and final settlement of the sum owing in the MAB suit and that pursuant to the settlement agreement, the appellant withdrew its notice of motion to the Court of Appeal to reinstate the appeal.

[60] At this juncture it is apposite to refer to the applicable legal principles on whether the plaintiff had proved, on a balance of probabilities, that it had suffered loss for a claim of this nature, which is a loss of chance, which could be found in the *locus classicus*, in *Mount v. Barker Austin* 14 LDAB 98, CA:

> Per Moore-Bick J:
>
> When a person sues his former solicitors for negligence in the conduct of proceedings which has led to his action being struck out his loss is normally measured by reference to his prospects of success in the primary litigation: see *Kitchen v. Royal Air Forces Association* (1958) 2 All ER 241 [1958] 1 WLR 563. *However, in order to recover for the loss of that kind the court must be satisfied that the Plaintiff had at least a "real" or "substantial" chance that he would have succeeded in the primary action, not merely a speculative one*: *Allied Maples Group Ltd v. Simmons & Simmons* (1995) 4 All ER 907, [1995] 1 WLR 1602 per Stuart-Smith LJ at P1614 of the latter report. If his prospects of success fall short of that, the court will a scribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all. (Per Moore-Bick J) (emphasis added).
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> Per Simon Brown LJ:
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> With these considerations in mind I would state the applicable principles as follows:
>
> (i) The legal burden lies on the Plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value *ie*, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success (I say

A "negligible" rather than "speculative" the word used in a somewhat different context in *Allied Maples Group Ltd v. Simmons & Simmons* (1995) 1 WLR 1602-lest "speculative" may be thought to include considerations of uncertainly of outcome considerations which in my judgment ought not to weigh against the Plaintiff in the present context, that of struck-out litigation).

B

(ii) The evidential burden lies on the defendants to show that despite their having acted for the Plaintiff in the litigation and value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his
C position and heavier still where, as here, two firms of solicitors successively have failed to do so. If of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

[61] In the present case, we find that there is evidence to show that the
D appellant and MAB had come to a settlement by way of the settlement agreement where a sum of RM2.85 million was to be paid by the appellant to MAB.

[62] In *Sharif And Ors v. Garrett & Co (a firm)* [2001] 3 All ER 195, the respondent firm of solicitors was sued in negligence when its client's case was
E struck out for want of prosecution. Simon Brown LJ speaking for the Court of Appeal in the following reasoning laid down a two-tier approach to the assessment of damages:

> In stating the principles generally applicable to this class of case, I indicated in *Mount v. Barker Austin (a firm)* [1998] PNLR 493 at 510, 511
> F a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.
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> G
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> With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of
> H any doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the *Armory v. Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.
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> I

[63] Guided by the legal principles in the above cases, we find that the appellant has lost something of value and that there is prospect of success in his appeal. There is nothing on record to show that the first or second and third respondents had discharged the evidential burden of showing that either of them had advised the appellant on the negative prospect of the appeal; on the contrary, the second respondent had advised differently. We accordingly find that and asses the prospect generously and arising from the first as well as the second and third respondents' professional negligence the appellant had been deprived of the chances of success of defending the claim in the MAB suit. We find that the award of nominal damages will not be just in the circumstances.

Conclusion

[64] Based on the aforesaid reasons, curial intervention is required, and we accordingly do so. The appeal is therefore allowed and the order of the High Court in respect of the second and third respondents is hereby set aside.

[65] We enter judgment for the appellant and award damages of RM2.85 million to be apportioned equally in the sum of RM1,425,000 each between the first respondent on one part and the second and third respondents of the other part. We further order that the first respondent to pay the appellant costs of RM10,000. The second and third respondents too must pay to the appellant costs of RM10,000. In respect of the cross-appeal, having upheld the preliminary objection with costs of RM3,000 to be paid to the appellant by the first respondent. We so order.